United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

No. 74-2211

United States Court of Appeals

FOR THE SECOND CIRCUIT

LOCALS 700, 743 AND 1746, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for Review of an Order of the National Labor Relations Board

BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS

STATEMENT OF THE ISSUE

Whether the National Labor Relations Board properly granted the Motion of United Aircraft Corporation, respondent before the Board, for Summary Judgment Dismissing the Complaint.

STATEMENT OF THE CASE

A. INTRODUCTION

This case is before the Court upon the petition of Lodges 700, 743, and 1746, International Association of Machinists and Aerospace Workers, AFL-CIO (hereinafter "Unions"), charging parties before the Board, to review the decision of the National Labor Relations Board (hereinafter "Board") in *United Aircraft Corporation (Pratt & Whitney Division; Hamilton Standard Division), et al.*, 213 NLRB No. 22, issued on September 3, 1974. By order of the Court[1] the case has been set for argument together with No. 74-1035, which involves the same parties, and which grows out of the Board's decision in *United Aircraft Corp. (Pratt & Whitney Division)*, 204 NLRB No. 133, which is referred to hereinafter as the *Pollack* case.[2]

On May 31, 1973, the Board's General Counsel issued a complaint, subsequently amended (J.A. 121-122; 5-11), alleging that by harassing union supporters and withholding information in 1971 and 1972, United Aircraft Corporation (hereinafter "the Company" or "Aircraft") had again[3] violated §§ 8(a)(1), (3), and (5) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1), (3), and (5).[4] The Company filed an answer (J.A. 11-12), and when *Pollack* was decided, a Motion for Summary Judgment (J.A. 124; 13-33). Subsequently, the case was transferred to the Board (J.A. 124; 34). The General Counsel filed a re-

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[1] Order dated October 3, 1974, per Mansfield, J.

[2] Pollack was the name of the Examiner (now Administrative Law Judge) who presided at the Board hearing in that earlier case. Our brief to this Court in No. 74-1035 will be referred to hereinafter as the "Pollack Brief," and our reply brief in that case will be referred to as the "Pollack Reply Brief." Occasional references to the Joint Appendix in *Pollack* will be described "Pollack J.A."

[3] See pp. 5-27 of our *Pollack* Brief, which describes the Company's history, and pp. 1-6 of our *Pollack* Reply Brief.

[4] The Statute is hereinafter referred to as "the Act" or "the NLRA."

sponse to the Motion (J.A. 124; 35-46), quoted in part *infra,* pp. 3-9, wherein he set forth certain of the facts he intended to prove if the matter went to hearing.

While the Motion for Summary Judgment was pending before the Board, the Company filed a Motion to take official notice, *inter alia,* of an arbitrator's Opinion and Award relating to two matters alleged in the complaint; and petitioners asked the Board to take official notice of certain evidence in the record of the arbitration proceedings (J.A. 124; 73-120).[5]

Upon that record, the Board, two members dissenting, granted the Company's Motion for Summary Judgment (J.A. 121-132). With respect to the two incidents alleged in the complaint which had been the subject of arbitration (paragraph 8 of the complaint), the Board held the arbitrator's award satisfied *Spielberg* standards, and dismissed those allegations finally (J.A. 127). With respect to the other incidents (alleged in paragraphs 9, 10, and 11 of the complaint), the Board, invoking *Collyer Insulated Wire,* 192 NLRB 837 and *Pollack,* remanded the parties to arbitration. It thus dismissed the complaint subject to the rubric that it retained jurisdiction of the allegations in the complaint (other than the incidents at issue in the arbitration proceeding):

> ". . . solely for the purpose of entertaining an appropriate and timely motion for further consideration on a proper showing that either (a) the dispute has not, with reasonable promptness after the issuance of the Decision here, either been resolved by amicable settlement in the grievance procedure or submitted promptly to arbitration, or (b) the grievance or arbitration procedures have not been fair and regular or have reached a result which is repugnant to the Act." (J.A. 128-129).

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[5] The Board did not rule on these motions. See note 4 to the Board's Certified List. The motions were unopposed. References preceding a semicolon are to the Board's Decision and Order; succeeding references to other portions of the record.

B. SURVEILLANCE, DISCRIMINATION, AND COERCION OF UNION ADHERENTS

1. Harassments and Threats Against a Union Steward

The General Counsel, in his Response to Order to Show Cause (hereinafter "Response"):

> "offer[ed] *de bene*, the following to show what facts [were] available to support the Amended Complaint and which would, at trial, be offered in support thereof." (J.A. 37).

We quote extensively from this offer of proof which is uncontroverted since the Board terminated the case prior to hearing.[6]

> "During the third week of June, 1971, Albert Weingarten was appointed union steward to represent various departments at the Respondent's Hamilton Standard plant. Since his hire in 1965, with one exception, Weingarten had encountered no difficulties with his supervisors.[11] Indeed, in response to Weingarten's complaints concerning overtime assignments, General Foreman Downing summoned him to his office only a few days prior to his appointment as union steward, and expressed a desire to 'work with' the men in connection with their grievances. Downing said that he would handle whatever problems Weingarten would bring to his attention and possibly that he would attempt to obtain a position of leadership (in management) for Weingarten at some future date. Two days after this conversation, Weingarten decided to become a union steward.
>
> "Upon his appointment as union steward, Weingarten began to wear a union shirt and steward badge. One week later, Weingarten voiced a grievance to

11 One year before his appointment as union steward, Weingarten had some unexplained 'trouble' with his immediate foreman, Richard Owens, which resulted in Weingarten's demotion. Since that time, Weingarten received his work assignments from his general foreman, Robert Downing.

6 The General Counsel took no position on the motion for summary judgment to which his Response was addressed. (J.A. 36). But see J.A. 46.

Downing concerning the alleged operation of lift trucks by non-department employees who were neither licensed nor authorized to operate them. He complained that this constituted a safety hazard.[12] Downing responded that this matter was none of Weingarten's business, that the latter was a troublemaker for bringing it to his attention, and that he would continue to assign these men to forklifts notwithstanding the union's objections. At the end of that work day, Weingarten reported his conversation with Downing to Union Business Representative George Purcell, who advised Weingarten to call a shop steward and file a grievance, should this practice continue.

"Since the practice was not stopped, Weingarten confronted Downing on July 7, 1971, advised the latter that he had a grievance and requested that a shop steward be called.[13] After first declaring that he did not need 'a goddam steward,' Downing stated that he would think the matter over. Shortly thereafter, Downing discussed the matter with shop steward Walter Delaney.[14]

"A short time after the Downing-Delaney meeting, Downing approached Weingarten at the latter's work site and engaged in a 10-15 minute diatribe against Weingarten, and the Union's representatives in the plant asserting that Weingarten had no right to wear a union shirt and union badge. Downing shouted at Weingarten that the latter was in a department where he was not wanted, that he was 'disrupting' work and 'badgering' Downing and that the latter would 'walk [Weingarten] out of the department' whenever he decided to. Downing added that 'he didn't care what the goddamned Union did'; that he 'would do whatever

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12 Pursuant to Article V[1]I, Section 1, of the 1971 collective bargaining agreement which was then in effect between the parties, Step One of the grievance procedure provides for informal adjustment between the grievant and a foreman. (J.A 20).

13 Article VII, Section 1, Step 1, of the above-mentioned contract provides in relevant part that 'The shop steward shall be given an opportunity to be present at the adjustment of a grievance arising under the terms of this agreement which is presented to the foreman directly by an employee.'

14 Although no formal written grievance was filed over this matter, it was later discussed at a joint shop safety meeting.

he wanted to in the department' and that 'the god-damned Union couldn't do anything about it.' Downing added: 'All you Union people are a bunch of no-good sons-of-bitching bastards and a bunch of trouble-makers.' Downing further suggested that 'he knew about the Union,' that 'they had all been a bunch of gangsters,' that 'they all carried guns,' and that 'where he come from they took care of people like this.' Finally, Downing asserted that Weingarten and Delaney had planned this entire incident, as part of a conspiracy against him.[15] Although this incident was later reported to Delaney, with Downing suggesting that Weingarten may wish to file a grievance against him (Downing) for harassment, no grievance, in fact, was ever filed over this matter.

"Thereafter, the Respondent, through Downing, ordered Weingarten not to follow the accepted practice of allowing departmental employees to stop working 5 to 10 minutes early for clean-up purposes and Downing would 'practically every day' approach Weingarten's work area to ask him whether he 'was quitting early.'

"It will also be shown that upon his appointment as union steward in July until his layoff at the end of October,[16] Weingarten was kept under surveillance by Foreman Owens. Specifically, each and every time Weingarten visited the Men's Room, for example, Owens showed up.[17] " (J.A. 41-43).

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[15] This exchange is corroborated by several witnesses.

[16] No charge alleging discriminatory motivation with regard to Weingarten's layoff was filed.

[17] The harrassment and disparate treatment toward Weingarten bears a striking similarity to Respondent's actions directed toward another Union Steward, Tobin, found by the Board to be violative of the Act (*United Aircraft*, 188 NLRB No. 96) wherein it was also held '. . . the record shows that a pattern of discrimination against Union stewards has been perpetrated by Respondent in prior cases.' (188 NLRB No. 96, at p. 3; citing also 179 NLRB 935 and 180 NLRB 278)."

In his amended complaint, the General Counsel also alleged that the Company had "subjected . . . Weingarten . . . to onerous jobs and undesirable working conditions for the reason that he joined or assisted the Union . . ." (J.A. 9, par. 11).

2. The Company Falsely Places Upon the Unions the Onus for Forcing an Employee To Retire

The General Counsel continued in his Response (J.A. 43-45):

> "... the allegation made in Section 9 c of the Amended Complaint illustrates a novel and insidious undermining of the employees' confidence in their bargaining representative. The allegation here injects a new dimension to Respondent's long list of proven violations of the Act and Respondent's actions directed to employees suggest that Union officials were acting directly contrary to employee interests.
>
> "The contract between the Company and the Union provides that 'Employees after attaining age sixty-five (65) may, at the discretion of the Company, be retired, or, where they are ineligible for retirement, be terminated from their employment with the Company.' (1971 Agreement, Article XXIII, Section 2.) Pursuant to this provision, it has been the Respondent's consistent practice to unilaterally extend the employment of retirees for one year periods when such extensions were deemed to be in the Company's best interests. The Union, General Counsel will show, has *never* been consulted with, nor has it ever participated in the management decision either to retire or to extend an employee's tenure.
>
> "Thus, Union member John Smallridge, an employee at the Middletown plant, reached the age of 65 in June, 1968, and became eligible for retirement. At the request of the Company, Smallridge accepted three one-year extensions, the last of which was due to expire on June 30, 1971. The Union played no part in any of these extension arrangements.
>
> "In April, 1971, approximately 10 weeks prior to the expiration of his extension, Smallridge was summoned to the office of his supervisors, General Foreman Peter Laskavin and Foreman Peter Valenti. The Respondent's representatives informed Smallridge that many men were being laid off and that Smallridge would therefore have to accept retirement ten weeks earlier than planned. Laskavin said that he had done

everything he could to retain him but that it was the Union that was forcing his early termination, not the Respondent. Laskavin related that Plant Service Supervisor, John LeBlanc, had spent the entire afternoon attempting to persuade the Union to permit Smallridge to remain until June 30, but to no avail. Accordingly, Smallridge was advised that he would be retired on April 18, 1971.

"Immediately thereafter, Smallridge confronted Union Representative Bill Nellis to complain about the Union's actions in forcing his premature discharge. Nellis denied that he had any responsibility for, or knowledge of Smallridge's retirement, and after checking with other union representatives, informed Smallridge that the Union was in no way responsible for Smallridge's termination.

"On the following day, Smallridge approached Valenti and Laskavin and accused them of improperly blaming the Union for his retirement. Valenti and Laskavin denied that they had ever attributed Smallridge's termination to the Union, now insisting that it was solely the Company's decision as part of a general layoff.

"Subsequently, on April 14, after Smallridge had been told that the Union had nothing to do with his early retirement, Union Stewards James Kenyon, in the company of employees Bob Hodges and Ed Botelho, entered the plant service office where Foreman Henry Czarnecki[19] was collecting contributions on behalf of Smallridge. When Hodges asked what these contributions were for, Czarnecki responded that 'Smallridge was being retired and since he had two extensions already and the Union had said that anyone who was on extension had to be retired.' Czarnecki added that 'there was nothing the foreman or the general foreman could do about it.'[20]

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[19] The Union has never filed a grievance over any of the foregoing events.

[20] Czarnecki, it should be noted, is a foreman in the same department as Smallridge but on another shift. Accordingly, it is clear that Respondent's false accusations regarding the Union's involvement with Smallridge's early retirement had spread.

> "General Counsel contends that Smallridge's case presents two separate attempts to falsely attribute accelerated retirement of an employee to the Union, which were given wide circulation by Respondent in order to disparage the Union in the eyes of the employees and consequently to wrongfully interfere with the protected rights of the employees."

The General Counsel alleged that by this conduct, the Company violated §§ 8(a)(1) and (3) of the Act. (J.A. 9). He also pointed out that a new complaint had issued against Aircraft alleging a repetition of the conduct held unlawful by the Board in 199 NLRB 658, order modified and enforced by this Court, 490 F.2d 1105 (1973) (J.A. 38, n. 5).

C. THE COMPANY WITHHOLDS INFORMATION RELEVANT TO A GRIEVANCE

1. Background: The Pollack Case and the 1971 Contract Negotiations Between the Parties

As this Court knows, one of the issues in the *Pollack* case was whether the Company's refusal to make available certain written materials—including foremen's notebooks—in connection with merit rating grievances violated § 8(a)(5) of the Act. See pp. 813-816 of the Joint Appendix in *Pollack*. While the General Counsel's complaint was pending before Examiner Pollack, the parties negotiated a new collective agreement. In the course of the negotiations, the Company insisted upon a new provision narrowing the Company's obligation to produce certain records at Step 2 of the grievance procedure (J.A. 87-88, 109-110). The Company proposed:

> "There shall be no obligation on the part of the Company to produce any of the above records except the specific record or records which would prove or disprove a specific factual contention of the aggrieved employee."

The Unions protested that the new language would violate their statutory rights, but the Company told the Union

negotiators this was not so (J.A. 109-110). The Unions also:

> ". . . objected to the proposal on the ground it would permit the Company 'to withhold information that might to some degree help to settle the grievance and you'll determine what's factual and what isn't factual and what will prove or disprove without giving a full disclosure and full facts on what it takes to settle a grievance,' the Company replied that 'That isn't what it says at all.' " (J.A. 88).

Despite the Union's objections, the new language was included in the 1971 agreement (J.A. 87).

On April 17, 1972, Examiner Pollack issued his recommended decision wherein he found that the Company's refusal to produce, *inter alia*, foremen's notes, in connection with merit rating grievances, violated § 8(a)(5) of the Act. He specifically rejected the Company's defense that its statutory duty attached "only after the Union had produced facts at Step 1 and Step 2 [of the grievance procedure] in substantiation of an employee's complaint . . ." *(Pollack,* J. A. 814). Examiner Pollack found *(id.):*

> "Such an interpretation of the Step 2 provision concerning the production of records would nullify the Union's statutory right to receive information relevant and necessary to the intelligent processing of a grievance, for a foreman's merit rating can scarcely be tested without reference to documents bearing upon the employee's work performance, such as production records and disciplinary notices. For example, the Union might well decide not to pursue a merit rating grievance where an employee's low rating in one or more rating factors seems proper in view of the disciplinary notices received by the employee during the rating period."[7]

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[7] The Examiner further found that although the right to information might be waived there had been no waiver in the 1968 contract in effect when the events at issue in *Pollack* occurred. (*Id.*)

2. The Company Falsely Denies the Existence of and Refuses To Give the Union Information Bearing Upon a Merit Rating Grievance

On June 16, 1972, employee Kenneth Roberge filed a grievance protesting a merit rating[8] he had received wherein he had been downgraded in accuracy, output, cooperation and use of working time (J.A. 85). At a Step 1 grievance meeting with Roberge's foreman, Steward Paul Kelly asked Pitney for certain notebooks where, in the words of the arbitrator (J.A. 86), Pitney had recorded "attendance of employees . . . production errors . . . notations about warnings to Roberge for poor use of working time and absences from work areas . . . and . . . a rating of Roberge's production time on various jobs as compared with an estimate of the time which normally would be required." Pitney denied knowledge of any such notebooks. *(Id.)*

The arbitrator found further:

> "At the Step 2 meeting, Kelly discussed the grievance with the Assistant to the Manufacturing Manager, John H. Phelps, who represented the Company at that Step. Senior Shop Steward Farley was also present for the Union. Mr. Phelps testified that he asked what information the Union had to substantiate its claim that Roberge had been incorrectly evaluated and that Kelly asked for the foreman's notebook, but that he did not consider it a document that the Company was required to produce under the language of the collective bargaining agreement. Kelly testified that after he presented the grievance he stated that he had not received any information from the foreman at the first step and that he 'felt it was the obligation of the Company to tell us why he was downgraded.' He further testified that Mr. Phelps referred to some 'small allegations,' 'three small things' that had occurred, but would not tell him when they occurred. He testified that when Mr. Phelps stated there was nothing to sub-

[8] The Company's merit rating system is described in *Pollack* J.A. 808-809.

stantiate the grievance, he told him that 'the substantiation for our grievance was in Pitney's notebooks and I asked him to produce them,' to which Mr. Phelps replied, 'he had no knowledge of any notebooks.'" (J.A. 86-87).

3. The Arbitrator Finds the Company Violated the Agreement

The Company filed a grievance over this incident and forced petitioner Lodge 1746 to arbitrate it. In the arbitration proceeding, the Company argued, *inter alia,* that the

> ". . . union raised no 'specific factual contention on behalf of the aggrieved employee which could be proved or disproved by the production of a specific record or records; . . . and that the Union was simply seeking to raise a factual issue by reviewing the foreman's notes. The Company also contend[ed] that [disclosure of] the foreman's notebooks . . . would not assist in the resolution of the grievance. . . . The Company also maintain[ed] that at Step 2 neither the foreman nor the employee is a contractually designated participant and a foreman's notebooks, at least those of Foreman Pitney involved in this case, are not intelligible without explanation by the foreman involved or the employee, neither of whom is present." (J.A. 88-89).

The arbitrator found for petitioner Lodge 1746. He pointed out that (J.A. 91-92):

> "Foreman Pitney's notes recorded information which obviously related to employee performance. . . . Foreman Pitney testified that he used the notes as 'memory joggers' when making his merit ratings, and that he referred to them prior to discussing merit ratings with his Group Supervisor."

And, he added (J.A. 93-94):

> "The basis of an employee's performance or merit rating lies peculiarly with the knowledge of the Company and unless appropriate documents, if they exist, supporting such rating are produced, the Union can not properly contest the rating or raise any question relat-

ing to particular incidents. . . . No 'serious effort' can be made to resolve such a difference without reference to the documents and records bearing on those facts. In addition, *the Company's interpretation of the words 'specific factual contention' would seem to be in conflict with the apparent assurance during the negotiations to the effect that relevant information that might help to settle the grievance would not be withheld.*

"The Company also argues that since the foreman is not a contractually designated participant at the Step 2 meeting, it should not be required to produce a foreman's notebooks at those proceedings, since such notebooks may be unintelligible without explanation by the foreman. However, the designation of certain persons as official representatives of the parties at the Step 2 meeting does not necessarily preclude the calling of other persons who may be necessary to interpret or explain documents there referred to. Thus, for instance, the presence of other persons may be necessary to interpret and explain documents about the use of which there may be no controversy at all. *The exclusion of such persons might well make a discussion at Step 2 sterile.*" (J.A. 94-95, emphasis added).

In his complaint the General Counsel had alleged, as Examiner Pollack had held on similar facts, that the Company's refusal to produce Pitney's notebooks at Step 2 of the grievance procedure violated §§ 8(a)(5) and (1) of the Act. (J.A. 8, 9).

D. THE BOARD'S DECISION AND ORDER

On this record the Board majority held with respect to the harassment, surveillance and coercion allegations (J.A. 127):

"Thus, the allegations of paragraphs 9, 10, and 11 are essentially limited to isolated acts involving two employees, each of whom work at a separate plant. We note that the parties involved in *United Aircraft Corporation, supra* [*i.e., Pollack*], and those involved herein are the same, and that the nature of the allegations contained in the instant complaint are also the same.

> Therefore, the only issue before us is whether the allegations of the instant complaint are subject to voluntary adjustment through the parties' grievance and arbitration provisions. We think that they are. All of the alleged acts of harassment and discrimination contained in paragraphs 9, 10, and 11 of the complaint, it seems to us, could also be resolved by the parties' grievance procedures, since there appears to be no question but that they are covered by the provisions of the contracts providing for arbitration on the request of either party if the dispute is not settled under the grievance procedures (the contracts with Lodges 700, 743, and 1746 have identical grievance and arbitration provisions)."

And, with respect to the information withholding allegations, the Board majority dismissed the complaint finally because the arbitrator had found that the Company had violated the collective agreement and the Company undertook to comply with the award and turn over the notebooks (J.A. 126), and "the Arbitrator's Opinion and Award satisfies the standards set forth in *Spielberg Manufacturing Company, supra* [112 NLRB 1080]." (J.A. 127).

Members Fanning and Jenkins dissented. They wrote (J.A. 131-132):

> "Unlike our colleagues, we did not see at the time of our dissent in 204 NLRB No. 133 any positive evidence of the maturation of the collective-bargaining relationship between the parties. Neither do we see any evidence here of progress toward that end. The misconduct by Respondent, if it occurred as alleged, would be a continuation of the pattern of conduct which has marked the relationship between the parties for more than a decade. Thus, it is alleged, *inter alia*, that Respondent refused to provide information relevant to the grievance-arbitration process and that it engaged in harassment of union stewards. The failure to provide information relevant to the grievance-arbitration process strikes at the very heart of the process itself and inhibits full and fair use of the process. Unlike our colleagues, we are not persuaded that Respond-

ent's belated offer to provide the information which gave rise to one of the allegations—to comply with the arbitrator's award which found that Respondent violated the collective-bargaining agreement—demonstrates that Respondent is willing to honor its contractual commitments or that the voluntary process is working. Rather, we see Respondent's refusal to provide the information so that the arbitrator could have made a finding on the merits in the first instance as further evidence of the unsatisfactory nature of the relationship which continues to exist between the parties. Neither, we submit, can anything positive be said for Respondent's continued harassment of union stewards.[9] In sum, it appears that this type of misconduct, similar to that in 204 NLRB No. 133 and the earlier cases, continues to permeate the relationship between the parties.

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9 In *United Aircraft Corporation*, 188 NLRB 633, the Board found 'the record shows that a pattern of discrimination against union stewards has been perpetrated by the Respondent in prior cases.' Also see 180 NLRB 278, and 179 NLRB 935."

ARGUMENT

I. THE BOARD ERRED IN REMITTING THE PARTIES TO ARBITRATION WITH RESPECT TO PARAGRAPHS 9, 10, AND 11 OF THE GENERAL COUNSEL'S COMPLAINT

A. The Record in This Case Further Demonstrates the Absurdity of the Board's Assumption that Aircraft Has "Matured"

The Board majority's decision in this case rests upon its discovery in *Pollack* (Pollack J.A. 847) that "the parties' collective bargaining relationship" had "matured." Since no complaint charging the Unions with violating the Labor Act in any respect has issued since the 1960 strike, the Board could only have referred to some demonstrated change in United Aircraft's policy or practices. For the reasons stated in our brief and reply brief in the *Pollack* case, we submit that even before it was supplemented on our motion for reconsideration by incorporating the Gen-

eral Counsel's response to the Company's motion for summary judgment in the present case, the record in *Pollack* required the conclusion that there has been no change. The present record, which consists of the General Counsel's Response and the proceedings in the arbitration of the Company's grievance concering *its own* refusal to provide relevant information, further buttresses our position. In light of our briefs in *Pollack*, we content ourselves with a few brief comments on this phase of the present case.

Supervisor Downing's anti-union diatribe and his surveillance and harassment of union steward Weingarten, pp. 4-6, *supra*, conforms to United's previously established "general pattern" of anti-union activity, 440 F. 2d at 99, and "bears striking similarity to [its] actions directed toward another Union Steward, Tobin * * *." (J.A. 43, n. 17). The Company apparently regards this kind of diatribe as "normal and wholesome" (Co. Br. in *Pollack*, p. 11); but the steward, whose livelihood is subject to the supervisor's disciplinary authority, cannot afford to take it so lightly.

Nor has the Company contented itself with monotonous repetition of anti-union tactics. In this case it perpetrated what the General Counsel aptly described (p. 7, *supra*), as "a novel and insidious undermining of the employees' confidence in their bargaining representative." (J.A. 44, n. 18). According to the General Counsel, the Company engaged in "two separate attempts to falsely attribute accelerated retirement of an employee to the Union, which were given wide circulation by Respondent in order to disparage the Union in the eyes of the employees and consequently to wrongfully interfere with the protected rights of the employees" (p. 9, *supra*). But the Board, viewing the relationship of the parties through *Collyer*-tinted glasses, characterized these allegations of the complaint as "involv[ing] the content of disputed conversations, between a single

employee and his immediate supervisors occurring on or about April 14, 1971." (J.A. 127).[9] Thus, the Board passes off this flagrant violation of § 8(a)(1)—"a new dimension to [the Company's] long list of proven violations of the Act" (p. 7, *supra*)—although other tribunals, in other contexts, would unhesitatingly brand what the Company did as "slander" or "commercial disparagement" and provide appropriate relief.

The facts found by the arbitrator, the Company's arguments to him, and his conclusion that the Company had wrongfully withheld information likewise undermined the Board's conclusion that the Company's attitude in labor relations matters has "matured." They establish quite the opposite, namely, that the Company engaged in strenuous efforts to undermine the operation of the grievance procedure. So anxious was the Company to withhold this information that it attempted to extract from the union a waiver of its statutory right to receive such information, and when that failed, argued to the arbitrator that it had succeeded in extracting such a waiver notwithstanding its own contrary representations in the negotiations, pp. 12-13, *supra*. Moreover, the Company condoned its foreman's false denial at Step 1 of the grievance procedure that he had any notebooks bearing on merit ratings (J.A. 86) and when the case reached Step 2 asserted through its representative at that Step that "he had no knowledge of any notebooks" (J.A. 87). The Company also argued before the arbitrator that there was no obligation upon it to produce foreman's records at Step 2 because the *foreman* was not the Company representative at Step 2 (J.A. 89, 94-95), thus implying that its Step 2 representatives may properly keep themselves in ignorance of the underlying facts, al-

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[9] A threat, denied by supervision, to fire a union official unless he resigned from office immediately could with equal accuracy be characterized in identically irrelevant terms.

though that posture assures that Step 2 meetings are bootless (J.A. 95).[10]

By withholding necessary information from the Union "the Company was, in essence, requiring it to play a game of blind man's bluff." *Fafnir Bearing Company* v. *NLRB*, 362 F. 2d 716, 721 (2 Cir. 1966), quoted with approval in *NLRB* v. *Acme Industrial Co.*, 385 U.S. 432, 438, n. 8. (1967). The game is a singularly riskless one for the Company, for, if it is not subsequently brought to account for wrongfully withholding the information, it both disparages the Union in the eyes of the employees and *totally* frustrates the grievance procedure; "and if [it] is brought to account [it] at least will lose nothing by [its] misconduct." *Williston on Contracts*, Third Edition, Section 1392, p. 442. By deferring the denial of information issues to arbitration, the Board assures that "at least [the Company] will lose nothing by its misconduct." It is, we submit, unconscionable as well as arbitrary to justify that result on the theory that "the parties' agreed-upon grievance and arbitration machinery can reasonably be relied on to function properly and to resolve the current disputes fairly." (J.A. 126). And since this very record reveals that the Company does what it can to render the Unions' resort to the grievance machinery "futile," it cannot sustain the Board's conclusion that

> "* * * the combination of past and presently alleged misconduct does not appear to be of such character as to render the use of that machinery unpromising or futile * * *." (J.A. 126).

Similarly untenable is the Board's conclusion that "the allegations of paragraphs 9, 10, and 11 are essentially limited to isolated acts involving two employees" (J.A.

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[10] When the Company ventured that ploy, this Court had already rejected the Company's similar effort to "evade responsibility" for the conduct of its first-line agents, see 440 F.2d at 92.

127). We have commented on the multiple fallacies of the "isolated acts" approach in our Reply Brief in *Pollack*, pp. 3-4, 10, 14-16. It warrants emphasis here, however, that, in at least one instance, widespread undermining of support for the Union was the proven *purpose* of an "isolated" violation. As the General Counsel pointed out, the Company's fabrication regarding the Union's responsibility for Smallridge's early retirement was "given wide circulation by [the Company]" and the Company's "false accusations * * * had spread" (p. 8, *supra*). To treat these incidents as "isolated acts" (J.A. 127) is to misconceive both the purpose and the inevitable effect of the alleged violations and to ignore the Company's entire anti-union history.

The only factor in the Company's favor, even on the Board's theory, is its anxiety to compel the Union to arbitrate; its willingness to comply with arbitration awards, and, as this case shows, pp. 20-23, *infra*, even to offer to arbitrate issues which the parties had *not* agreed to arbitrate, to avoid a Board order. But, as we have shown in *Pollack*, all this evidences is the Company's preference for the ineffectuality of arbitration to the meaningful sanctions of the legal system provided by Congress for enforcement of the Act, not as the Board would have it, that the Company's labor relations policy has "matured."

It thus appears not only that the findings which are critical to the Board's decision to defer are not supported by substantial evidence on the record considered as a whole and must therefore be reversed (see § 10(e) of the Act), *Universal Camera Corp.* v. *Labor Board*, 340 U.S. 474 (1951), but that the whole "maturity" issue is a sham. And this in the end is tacitly acknowledged by the Board itself when it says:

> "Therefore, *the only issue before us is* whether the allegations of the instant complaint are subject to voluntary adjustment through the parties' grievance and arbitration provisions." (J.A. 127, emphasis added).

This is a radical departure from the balancing test promised in *Collyer*:

> "Thus, this case like each such case compels *an accommodation* between, on the one hand, the statutory policy favoring the fullest use of collective bargaining and the arbitral process and, on the other, the statutory policy reflected by Congress' grant to the Board of exclusive jurisdiction to prevent unfair labor practices." (192 NLRB 837, 841, emphasis added).

B. The Board's Decision Must Be Reversed Because the Deferred Issues Are Not Arbitrable "at the Request of Either Party"

The allegations of the complaint which the Board remitted to arbitration dealt with the interrogation and harassment of a union steward, and with the false accusations that the Union had been responsible for the early retirement of one employee. While neither of these actions is expressly forbidden in the agreement, it is arguable that both constitute breaches of the prohibition in the second paragraph of Article IV against company "restraint or coercion" of employees because of their exercise of the right "to become or remain members of the union."[11] But it does not follow that such breaches, assuming they are grievable, are even arguably arbitrable under the highly unusual and extremely restrictive clauses of this agreement, quoted at p. 23 of our Reply Brief in *Pollack*, which provide "for arbitration [of specified issues only] upon the request of either party" (J.A. 127). *International U. of E. R. & M.*

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[11] Article IV was omitted from the portion of the contract submitted in support of the Company's Motion for Summary Judgment, but is part of the record in the *Pollack* case. The second paragraph reads as follows (*Pollack* J.A. 510, 585, 609:

> "Both the company and the union recognize that employees covered by this agreement have the right to become or remain members of the union or to refuse to become or remain members of the union without being subject to restraint or coercion from either the company or the union because of their exercise of this right."

Wkrs. v. *General Electric Co.*, 407 F. 2d 253, 255-261 (2 Cir., 1968), cert. denied, 395 U.S. 904 (1969).

The Board's assertion (J.A. 127) that "there appears to be no question but that [these disputes] are covered by the provisions of the contracts providing for arbitration on the request of either party * * *" is completely in error. Exactly the opposite is true; nobody, not even the Company, *ever* claimed that these disputes are covered "by the provisions * * * providing for arbitration at the request of either party." Indeed the Company, at least impliedly, admitted that they are not, for it offered *to agree* to submit these disputes to arbitration, pursuant to Subsection (b) of Section 3 of Article VII of the contract which provides (J. A. 23):

> "(b) Other grievances arising under this contract which are not settled at Step 4 of Section 1 of this Article may be referred to arbitration *if the company and the union mutually agree in writing.*" (Emphasis added). (See J.A. 31.)

In footnote 3 of its opinion (J.A. 127), the Board took note of the Company's invitation to the Union to attempt to resolve these disputes "either through the existing grievence procedure *or through a special dispute-solving mechanism to which the parties might mutually agree,*"[12] but it overlooked the admission implicit in the offer that the disputes were *not* arbitrable under "the provisions providing for arbitration at the request of either party." The Board's finding of arbitrability under that provision must therefore be reversed as inconsistent with the record. With reversal of that finding, the Board's dismissal of paragraphs 9, 10 and 11 of the complaint necessarily falls, for dismissal was

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12 The Company's self-serving offers *to agree* to arbitrate statutory violations which the parties were *not* contractually bound to arbitrate, the Union, of course, declined (J.A. 31, 71).

predicated expressly on the Board's erroneous finding of arbitrability under *that* provision (J.A. 127):

> "All of the alleged acts of harassment and discrimination contained in [those] paragraphs * * * it seems to us, could also be resolved by the parties' grievance procedures, *since* there appears to be no question but that *they are covered by the provisions of the contracts providing for arbitration on the request of either party* * * *" (Emphasis added.)

Assuming, *arguendo*, however, that the Board did not mean what it said in the italicized portion of the quotation, but considered the Company's mere *offer* to agree to arbitrate sufficient to warrant deferral, we would have a further extension of *Collyer* which is not merely arbitrary, and contrary to the professed rationale of *Collyer*, but *subversive* of a core premise of the *Steelworker* trilogy which the Board professes is its *Collyer* guide. For crucial to the trilogy is the proposition that "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574, 582 (1960). "No obligation to arbitrate a labor dispute arises by operation of law. The law compels a party to submit his grievance to arbitration only if he has contracted to do so." *Gateway Coal Co.* v. *Mine Workers*, 414 U.S. 368, 374 (1974).

By declining to adjudicate and remedy statutory violations which the Unions had "not agreed so to submit" the Board sought to coerce the Unions to enter into an agreement to arbitrate (J.A. 71-72). Indeed, in the *Pollack* case (Pollack J.A. 847), the Board characterized deferral as a "direct[ive] to [arbitrate] by this Board." While not an order in terms, it is such in effect, for Board inaction leaves the charging party no option but to agree to arbitrate or surrender. Such a "directive" flouts Congress' policy, which is to encourage, but *not* coerce or compel, the making of agreements to arbitrate.

Of course, the Board's illegal action cannot be excused on the theory (even if it were correct, which, of course, it is not), that "most labor organizations under such circumstances do not come to us with such problems" *Pollack*. J. A. 847-848), or that it would be "sensible" for the Unions, in the Board's opinion, to look to arbitration rather than to Congress' enforcement machinery "to resolve the kinds of disputes involved in this proceeding" (*id.*). "It is not necessary for us to justify the policy of Congress. It is enough that we find it in the statute. That policy cannot be defeated by * * * the Board under the guise of administration * * *." *Colgate Co.* v. *Labor Board*, 338 U.S. 355, 363 (1949).

II. THE BOARD ERRED IN FAILING TO ADJUDICATE THE ISSUES IN PARAGRAPH 8b OF THE COMPLAINT

In discussing the Board's dismissal of ¶ 8b of the complaint (J.A. 126, 127), it will be useful to recapitulate briefly the posture of the issue before the Board. Paragraph 8b alleged that the Company had violated § 8(a)(5) by withholding information relevant and necessary to the presentation of grievances with respect to the operation of the merit system (J.A. 8). The arbitrator determined that the Company's refusal to provide the relevant information was a breach of the agreement, pp. 11-13, *supra*. At that time the Company's Motion for Summary Judgment was pending before the Board. The Company moved to put the arbitrator's award into the record and the union in turn asked the Board to take notice of certain evidence in the record of the arbitration proceedings (J.A. 73-120). Consequently, the Board knew not only that the arbitrator had determined that the Company had withheld relevant information, and that this was a breach of the agreement, but also that the Company had falsely denied the existence of the relevant information, that it had sought to extract a waiver of the union's right to receive the relevant information and had misrepresented those negotiations to the arbitrator. And,

of course, the Board also knew that the arbitrator had not found these additional acts of bad faith to constitute violations and had not even ordered the Company to cease and desist from future withholding. Under these circumstances, we submit, the Board erred in dismissing ¶ 8b of the complaint.

A. As we have seen, the materials before the Board established a *prima facie* case that the Company had violated its statutory duty to bargain in several significant particulars in addition to the refusal to produce the information alleged in the complaint. Of course, if summary judgment had been denied and the case had gone to hearing, the General Counsel would have been empowered to amend the complaint to add these additional alleged violations of § 8(a)(5).[13] This was pretermitted by the Board's dismissal of the complaint subject only to the limited reservation of jurisdiction quoted at p. 3, *supra*.

The Board found "that the Arbitrator's Opinion and Award satisfies the standards set forth in *Spielberg Mfg. Co.* [112 NLRB 1080] and effectively disposes of ¶ 8 of the complaint" (J.A. 127). But the United States Court of Appeals for the District of Columbia Circuit has held "that the Spielberg doctrine only applies if the arbitral tribunal (A) clearly decided the issue on which it is later urged that the Board should give deference * * *." *Banyard* v. *NLRB*, 505 F.2d 342, 347 (D.C. Cir. 1974). And the court followed and reaffirmed its holding in *Local Union 715* v. *NLRB*

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[13] Section 102.17 of the Board's Rules and Regulations, 29 C.F.R. § 102.17, provides as follows:

> "Any such complaint may be amended upon such terms as may be deemed just, prior to the hearing, by the regional director issuing the complaint; at the hearing and until the case has been transferred to the Board pursuant to § 102.45, upon motion, by the administrative law judge designated to conduct the hearing; and after the case has been transferred to the Board pursuant to § 102.45, at any time prior to the issuance of an order based thereon, upon motion, by the Board."

Compare Rule 15(a) of the Federal Rules of Civil Procedure; *Foman* v. *Davis*, 371 U.S. 178 (1962).

(*Malrite*), 494 F. 2d 1136, 1139-1140 (D.C. Cir. 1974) (footnote omitted):

> "Inasmuch as the arbitrators could not have considered these transactions, it is difficult to agree with the Board's conclusion that judicial enforcement of the award will provide 'full remedial relief.' In fact, this reasoning appears to contradict the Board's own decisions to the effect that deferral is not appropriate with respect to an issue not considered by the arbitration panel. Raytheon Co., 140 NLRB 883, 885 (1963), set aside on other grounds, 326 F. 2d 471 (1st Cir. 1964); Monsanto Chemical Co., 130 NLRB 1097 (1961). The gist of these decisions and others is that deferral on an issue not considered by the arbitrator cannot be justified by the policy which underlies the doctrine of deferral:
>
> > 'It manifestly could not encourage the voluntary settlement of disputes or effectuate the policies and purposes of the Act to give binding effect to an arbitration award which does not purport to resolve the unfair labor practice issue which was before the arbitrator and which is the very issue the Board is called upon to decide in the proceeding before it. Monsanto Chemical Co., 130 NLRB at 1099."

B. We submit further that the Board erred in its disposition of the violation which was specifically alleged in ¶ 8b of the complaint. In our view, under a proper application of *Spielberg*, the Board should have accepted the arbitrator's determination that the Company had withheld the information and that it was not privileged to do so under the contract; on that basis it should have determined that the Company had violated § 8(a)(5) and provided an appropriate remedy. See our opening brief in *Pollack*, pp. 59-60. There are three separate lines of analysis which lead to this result: (1) a correct reading of *Spielberg* itself; (2) the interpretation of *Spielberg* in *Banyard, supra;* and (3) the error in the Board's finding that the arbitrator's award "effectively disposes of" (J.A. 127) the violation. We shall discuss each in turn.

(1) It is appropriate to begin with *Carey* v. *Westinghouse*, 375 U.S. 261 (1964), where the Supreme Court approved *Spielberg* and demonstrated its understanding of what that decision entailed. *Carey* did not treat arbitration and unfair labor practee proceedngs as mutually exclusive avenues of redress, as does the Board's decision in this case. On the contrary, the precise holding of *Carey* was that an agreement to arbitrate is enforceable even though a Board remedy (either under § 9, § 10(a) or § 10(k) of the Act) is likewise available: "The superior authority of the Board may be invoked at any time. *Meanwhile* the therapy of arbitration is brought to bear in a complicated and troubled area." *Id.*, at 272; emphasis supplied. And the Court's discussion of the effect of an arbitration award in a deferral situation makes clear that the Court did not expect that the Board proceeding would terminate, as here, simply upon a finding that the arbitration proceedings were fair and regular and that the result was "not repugnant" to the Act. (See J.A. 127.) Rather, the Court assumed that where those standards are met, the Board will accept the arbitrator's *construction of the contract*, and fulfill its own statutory responsibilities in light of that interpretation:

> "Thus, the weight of the arbitration award is likely to be considerable, if the Board is later required to rule on phases of the same dispute. The Board's action and the awards of arbiters are at times closely brigaded. Thus where grievance proceedings are pending before an arbiter, the Board defers decision on the eligibility of discharged employees to vote in a representation case, until the awards are made. See *Pacific Tile & Porcelain Co.*, 137 NLRB 1358, 1365-1376, overruling *Dura Steel Products Co.*, 111 NLRB 590. See 137 NLRB, p. 1365, n. 11." 375 U.S. at 271.[14]

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[14] In *Raley's Inc.*, 143 NLRB 256, quoted with approval in *Carey*, 375 U.S. at 270, n. 7, an arbitrator had determined that certain employees were an accretion to the bargaining unit under the contract. The Board accepted that determination, and on that basis concluded that a representation petition filed by another union encompassed employees covered by an existing collective bargaining agreement and, therefore, was subject to the Board's contract bar doctrine. Accordingly, the Board decided on the merits that that representation petition should be dismissed.

Indeed, the Court's discussion of the Board's deferral policy was expressly premised upon its view that the contractual and statutory remedies are *concurrent*:

> "But the existence of a remedy before the Board for an unfair labor practice does not bar individual employees from seeking damages for breach of a collective bargaining agreement in a state court, as we held in *Smith* v. *Evening News Assn.*, 371 U.S. 195. We think the same policy considerations are applicable here; and that a suit either in the federal courts, as provided by § 301(a) * * *, or before such state tribunals as are authorized to act * * * is proper, *even though an alternative remedy* before the Board *is available*, which, if invoked by the employer, will protect him." 375 U.S. at 268. (Emphasis added.)

The Board itself urged this reading of *Carey*, *supra*, and *Smith* v. *Evening News*, 371 U.S. 195 (1962), in its brief to the Supreme Court in *NLRB* v. *C & C Plywood Corp.*, 385 U.S. 421 (1967). Commenting on those cases the Board argued:

> "* * * the Court recognized that, where the collective agreement contains an arbitration clause, *the Board has ordinarily declined to exercise its jurisdiction in situations where that would permit a party to a prior arbitration proceeding to relitigate before the Board questions already determined by the arbitrator*, provided that 'the procedure [before the arbitrator] was a fair one and the results were not repugnant to the Act'; the Court also noted that the Board may also defer decision because of the pendency of arbitration."[15]

The Board has heretofore recognized that where an arbitrator *finds* a contract violation, but fails to grant full relief, the Board must order an appropriate remedy. In *Schott's Baking Co.*, 164 NLRB 332, 333-334, an arbitrator had determined that the transfer of an employee was discriminatorily motivated and therefore in violation of the

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15 Bd. Br. #53, Oct. Term, 1966, pp. 12-13, footnote omitted, emphasis supplied.

contract. An unfair labor practice charge involving the same transfer and a subsequent discharge of the same employee came before the Board under § 8(a)(3) of the Act. Unlike here, the Board did not treat the arbitrator's award as justifying dismissal of the complaint. Instead, the Board accepted the arbitrator's determination that the transfer had been discriminatorly motivated, and made a similar finding on the basis of evidence which had been introduced at the Board hearing. 164 NLRB at 333. Having thus found a violation of § 8(a)(3) by virtue of the transfer, and that the subsequent discharge was a consequence of that transfer, the Board directed the employee's reinstatement. The arbitrator had conditioned reinstatement to the pre-transfer job upon invalidation of the discharge, the validity of which was not before him (*id.*).

The Board's reading of *Spielberg* in this case avoids relitigation but is inconsistent with the Congressional policy, discussed at length in our briefs in *Pollack*, in favor of concurrent contractual and statutory remedies. Our position, on the other hand, satisfies both policies: By giving effect to the findings of the arbitrator and—insofar as relevant—to his interpretation of the contract, the Board avoids relitigation of issues he has decided; and by adjudicating the unfair labor practice complaint on the basis of those premises and, remedying an unfair labor practice if found, the Board fulfills its responsibilities under § 10 of the Act. It is precisely because the Board's post-*Collyer* reading of *Spielberg* is inconsistent with this duty that the two members of the Board who dissented in this case objected also in *Malrite of Wisconsin, Inc.*, 198 NLRB No. 3, 80 LRRM 1593, 1594-1595.

> "* * * Nothing in Spielberg suggests that the Board contemplated leaving the parties where it found them if, on the basis of the arbitrators' findings of fact, it was clear than an unfair labor practice had been committed. Spielberg was a case where the Board, granting 'recognition' to the arbitrators' award, found that

Respondent had not violated the Act and, on that basis only, dismissed the complaint.

"In the instant case it is perfectly clear, whether Collyer or preexisting law is followed, that Respondent is in violation of this statute. Yet the majority refuses to provide * * * [a] remedy * * *.' We hold, to the contrary, that an unfair labor practice, established by a preponderance of the evidence is indeed a matter for the Board's serious concern.

* * *

"The majority appears to be willing to assume that there is little, if any, difference in the enforcement of a contract and the prevention of unfair labor practices involving contract interpretation. The forum for one is the court, with or without arbitration. The forum for the other is the Board exclusively, enforcing its orders through the courts. In the one instance damages are measured in material terms within the framework of commercial contract law. Before the Board, however, the question of damages is considered in the context of employee rights and the responsibilities imposed on unions and employers under this statute. * * * To this end Congress granted the Board the widest possible discretion. In effectuating the policies of the Act the Board has issued cease-and-desist orders to prevent conduct which even *tends* to affect statutory rights. As the Supreme Court has pointed out, there is no necessary inconsistency between arbitration leading to judicial enforcement and a Board proceeding enforced in the same manner. Certainly, that is true in the instant case where the Board can properly accept the arbitration panel's interpretation of the contract."

While we find these arguments compelling, we must advise the Court that the District of Columbia Circuit in *Malrite* did not accept them:

"The petitioner misapprehends the *Spielberg* rule. The Board has made it clear that, when deferral is appropriate, the arbitration award becomes the sole remedy for both contractual and statutory violations:

'If complete effectuation of the Federal policy is to be achieved, we firmly believe that the Board, which is

> entrusted with the administration of one of the many facets of national labor policy, should give hospitable acceptance to the arbitral process as 'part and parcel of the collective bargaining process itself,' and *voluntarily withhold labor practice charges involving the same subject matter*, unless it clearly appears that the arbitration proceedings were tainted by fraud, collusion, unfairness, or serious procedural irregularities or that the award was clearly repugnant to the purposes and policies of the Act.'

International Harvester Co., 138 NLRB 923, 927 (1962), aff'd sub nom. Ramsey v. NLRB, 327 F. 2d 781 (7th Cir.), cert. denied, 377 U.S. 1003, 84 S. Ct. 1938, 12 L. Ed. 2d 1052 (1964) (footnote omitted, emphasis added). In the absence of procedural irregularity or statutory repugnancy, therefore, the Board is free *to adopt the arbitral award as a complete remedy for unfair labor practices related to the contractual dispute*, even though the Board has exclusive authority to adjudicate unfair labor practice charges. Contrary to the union's contentions here, the Board is not obliged to entertain the unfair labor practice charges after a proper deferral." *Local Union 715, etc.* v. *NLRB*, 494 F. 2d 1136, 1138 (D.C. Cir. 1974). (Emphasis in final paragraph added.)

The court went on to describe the "three prerequisites for deferral" established in the *Spielberg* opinion. It observed that 'the trial examiner and the Board agree that the award in this case satisfies all three conditions" (*id.*). (The union had not argued that the three *Spielberg* conditions were not met.) Accordingly, the court held that the Board properly refused to remedy as an unfair labor practice the conduct which the arbitrator had found to be a breach of contact.[16] In short the Court of Appeals' decision in *Malrite* stands as a square holding contrary to our reading of *Spielberg* and thus to the first line of analysis which we are advancing here. Nevertheless, with all respect to that court, we urge that this Court reexamine the problem. Such examination, we think, will produce a contrary result.

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[16] The court also approved the Board's determination that the employer's refusal to comply with the award was irrelevant (*id.* at 1138-1139).

(2) Our second line of analysis, however, is not only consistent with, but receives strong support from the District of Columbia Circuit's opinion in *Malrite* as well as in the subsequent *Banyard* case, *supra*, wherein that court elaborated its approach to the *Spielberg* doctrine. For, as we have seen, in those cases the Board held that deferral is appropriate only with respect to matters which the arbitrator actually decided. And it is quite clear that the arbitrator did not decide whether the withholding of information is an unfair labor practice or what remedy for the withholding of information is required by the policies of the National Labor Relations Act (as general matter, or in the case of this particular employer). Indeed, had the arbitrator undertaken to decide *those* issues he would have been usurping his authority and the Court of Appeals in *Banyard* added that the *Spielberg* doctrine applies only if "(B) the arbitral tribunal decided an issue within its competence." [17]

We are well aware that this second line of analysis can lead to a result which is at odds with the actual decision in *Malrite* insofar as it affirmed the Board. As to this we can only say that the Court of Appeals did not apply the limitations on deferral which it announced in the second part of its *Malrite* opinion to the issue decided in the first part.

Banyard, supra, supports our analysis for the additional reason that the court there made plain that its acceptance of the *Spielberg* and *Collyer* "doctrines was and is founded upon the premise that they are appropriately applied only where the resolution of the contractual issues is congruent with the resolution of the statutory unfair labor practice issues." (505 F. 2d at 345; see also *id.*, at 348.) We assume that the question whether the Company breached the contract by withholding information is identical with the question as to whether it thereby violated § 8(a)(5). But the question of the appropriate remedy for the breach of con-

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[17] 505 F.2d at 347; for "(A)" see page 24, *supra*.

tract is not congruent with the question of the appropriate remedy for the statutory violation. That difference results from the fundamental difference between arbitrators and the Board, both in their function and in the source of their authority. See particularly *Warrior & Gulf, supra*, 363 U.S. at 581-582, and *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 52, 54 (1974). The heart of the matter is that unlike an arbitrator, the "Board asserts a public right vested in it as a public body, charged in the public interest with the duty of preventing unfair labor practices." *National Licorice Co.* v. *Labor Board*, 309 U.S. 350, 364 (1940).

Thus, we submit that the limitations the District of Columbia Circuit correctly read into the *Spielberg* doctrine bar the Board from dismissing a complaint where the arbitrator found a breach of contract which would also be a violation of the Act. Indeed, when the Board refuses to remedy violations which the arbitrator's award has implicitly established, it repudiates its public duty declared in *National Licorice Co., supra*, and in the cases construing § 10(c) which we cite in the margin.[18]

(3) We have thus far dealt with the problem in principle as if the present case were like all other cases in which the Board has dismissed a complaint because the arbitrator has already passed on the issue. But, of course, this case differs from other cases because, as the citation of *United Aircraft* in *National Radio* shows, this employer differs in kind from others in its approach to its obligations under the Act. See our Brief in *Pollack*, pp. 47-49, Reply Brief, 1-10. And so, when the Board, with the record of *Pollack* and this case as well as earlier cases before it, said simply that the arbitrator's opinion and award "effectively disposes of" (J.A. 127) the issues raised by paragraph 8(b) of the complaint, it clearly committed error. The award "effectively disposes

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[18] *NLRB* v. *Rutter Rex Mfg. Co.*, 396 U.S. 258, 262 (1969); *International Woodworkers, etc.* v. *NLRB*, 380 F.2d 628, 630-631 (D.C. Cir. 1967); *International Union, etc. (UAW)* v. *NLRB*, 427 F.2d 1330 (6 Cir.).

of'' those allegations only in the narrow and impermissible sense that it gave the Board an excuse under the expansion of its *Collyer* and *Spielberg* doctrines to ''effectively dispose[] of'' yet another case on its docket. What that award certainly did not do was ''effectively dispose[] of'' the violation of the Act by promoting the public interest in ''the prevention of unfair labor practices by the employer in the future, [and] the prevention of his enjoyment of any advantage which he has gained by violation of the Act.'' *National Licorice Co., supra,* 309 U.S. at 364. In this connection a few considerations deserve emphasis.

Not only is the Company a recidivist offender against the Act, but it has previously engaged in violations of the same character as alleged in paragraph 8(b), namely, the unlawful withholding of information. *United Aircraft Corporation,* 199 NLRB 658, enforced 490 F.2d 1105 (2 Cir. 1973); *United Aircraft Corporation,* 192 NLRB 382 (petitions for review and enforcement pending on other issues, 2 Cir., Nos. 72-1935, etc.). Thus, a broad order requiring the Company to provide relevant information to the representatives of its employees is essential to prevent repetition of the offense. The arbitrator's award, as we have already observed, imposes no sanction whatsoever even if the Company were to take the same action with respect to the next demand for information by the Union even on a merit rating grievance.

The withholding of information is, as the Supreme Court recognized in *NLRB* v. *Acme Industrial Corp.,* 385 U.S. 432 (1967), inimical to the proper operation of the grievance procedure. It is that grievance procedure which the *Collyer* and *Spielberg* doctrines are avowedly designed to reinforce. Under these circumstances, to sanction the Board's failure to remedy the denial of information ''would indeed be to 'turn the blade inward.' '' Cf., *Graham* v. *Brotherhood of Firemen,* 338 U.S. 232, 237 (1949).

Additionally, the circumstances surrounding the Company's withholding of information reflect so adversely on the Company's attitude toward its bargaining obligations as to sharply differentiate this case from the run-of-the-mill refusal of information case. Even if these surrounding circumstances do not constitute independent unfair labor practices which should be treated as we urge at pp. 23-28, *supra*, the extraordinary character of the violation herein establishes that the ordinary cease and desist remedy does not "effectively dispose[] of" the violation, but rather is totally inadequate.

Finally, and perhaps most important, the Board's failure to provide an appropriate remedy leaves the Company with the fruits of its own unfair labor practices. For by withholding the information the Company has succeeded in delaying the processing of the underlying grievance and has once again demonstrated its ability to frustrate the Union's functioning as a collective bargaining representative. That, of course, is its primary objective. Additionally, it has imposed on the Union the expense of arbitration. To be sure, the Company had to absorb equal costs, but these are a mere pittance to a Company which in the state of Connecticut alone "employ[s] a total of well over 40,000 employees" (*Pollack*, J.A. 844). Since it is the Company which insisted that the case proceed to arbitration it is clear that it regards the expense of arbitration money well spent if it can secure immunity from the processes of the Board and the courts. The Company also had to comply with the arbitrator's award which consists of giving the Union the information to which it has been entitled from the beginning. In short, the Company has lost nothing, but has undermined the Union's prestige and has frustrated the collective bargaining process which Congress mandated. As *Williston* has observed, p. 18, *supra*, a rule of law which treats wrongdoers so is unfair and counterproductive. And

the Board's policy which—in the name of promoting the practice and procedure of collective bargaining—compliments the Company for complying with an arbitration award and leaves the unfair practices unremedied, is simply outrageous.

CONCLUSION

For the reasons stated herein and in our briefs in the *Pollack* case, the decision of the Board herein should be reversed with directions to reinstate the complaint and to treat the arbitrator's award as dispositive of those issues —and those issues only—which he decided.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Locals 700, 743 and 1746, International Association of Machinists and Aerospace Workers, AFL-CIO,	)	
Petitioners,	)	
v.	)	No. 74-2211
National Labor Relations Board,	)	
Respondent.	)	

CERTIFICATE OF SERVICE

I hereby certify that three copies of the printed Brief for Petitioners in the above-captioned matter have been mailed by first class mail, postage prepaid, this 18th day of April, 1975, to:

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